

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

BEATRICE FLEMING,)	
)	
Plaintiff,)	Civ. No. 1996-158M
)	
v.)	
)	
GOVERNMENT OF THE VIRGIN ISLANDS ET)	
AL.,)	
)	
Defendants.)	

MEMORANDUM

Beatrice Fleming ["Fleming" or "plaintiff"] contends that on or about December 31, 1995, the defendants,¹ acting pursuant to a search warrant, illegally entered and searched her home, unlawfully seized and removed items belonging to her from her home, and unlawfully detained and arrested her. Count I of Fleming's complaint alleges a cause of action pursuant to 42 U.S.C. § 1983 against the defendants for violating her constitutional rights. Count II, although inartfully plead, seems to allege the torts of trespassing and conversion against all defendants. The defendants have moved to dismiss the

¹ The defendants include: the Government of the Virgin Islands, the Virgin Islands Police Department, unnamed Special Bureau Operations Bureau officers, unnamed Narcotics Strike Force officers, Governor Roy L. Schneider, Ramon Davila, Dominique Degraff, Joslyn Fleming, Melvin Venzen, Hiram Graneau, Dwayne DeGraff, Edward Brathwaite, Adelbert Molyneaux, Terrance Manning, James Morrishaw, Derrick Greaves, Elbin Fahie, Carl Charleswell, and an as yet unidentified law enforcement officer referred to as John Doe 12.

complaint for failure to state a claim upon which relief may be granted, or, alternatively, for summary judgment.

A motion to dismiss for failure to state a claim tests the sufficiency of the complaint. See FED. R. CIV. P. 12(b)(6); *Manns v. The Leather Shop*, 960 F. Supp. 925, 927 (D.V.I. 1997). The Court will only grant a motion to dismiss for failure to state a claim if it appears that the plaintiff can prove no set of facts in support of that claim that would entitle the plaintiff to relief. *Ferris v. Virgin Islands Industrial Gases, Inc.*, 23 V.I. 183, 186 (D.V.I. 1987). Summary judgment is appropriate only when there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. PROC. 56(c). Under either a motion to dismiss or summary judgment analysis, the Court must construe the facts in a light most favorable to the plaintiff.

It is well established that the Government of the Virgin Islands, its agencies and other instrumentalities, and its employees acting within their official capacities, are not "persons" within the meaning of section 1983. *Ngiraingas v. Sanchez*, 495 U.S. 182, 192 (1990); *Eddy v. Virgin Islands Water & Power Auth.*, 955 F. Supp. 468, 476 (D.V.I. 1997), *amended on other grounds by* 961 F. Supp. 113 (D.V.I. 1997). Accordingly, the Court will dismiss Count I for failure to state a claim upon

which relief may be granted to the extent that it alleges a section 1983 claim against the Government of the Virgin Islands, its agencies, and the individual defendants in their official capacities.

The defendants contend that even if sued in their individual capacities, they enjoy qualified immunity which shields them from Fleming's remaining claims. Fleming alleges that the defendants illegally removed items belonging to her from her home when they executed a search warrant. The search warrant authorized the defendants to search Fleming's residence² and to seize

any and all controlled substances, cutting agents, packing materials and scales associated with the preparation of controlled substances for sale, ledgers, correspondence [sic] and financial records concerning the purchase of controlled substances, currency and drug paraphernalia.

(Search Warrant dated Dec. 29, 1995, attached as Ex. A to Defendants' Mot. to Dismiss.) Fleming contends that the defendants unlawfully seized numerous items that were not included within the purview of the search warrant, such as a compact disc player, several pairs of sneakers, video cassettes, jewelry, food stamps, and a Sega Genesis Entertainment System. (See Affidavit of Beatrice Fleming, attached to Pl.'s Opp'n to Mot. to Dismiss.) Fleming also includes in her list of allegedly unlawfully seized property a Sony C.C.D. TR93-NTSC Handy Cam

² Fleming did not own the subject property, but was a tenant.

Video. (*Id.*).

The defendants concede that they did remove property from Fleming's residence, but contend that they only seized items pursuant to the search warrant, namely, marijuana, scales, syringes, and ammunition. (See Inventory of Property/Receipt, attached as Ex. C to Defendants' Mot. to Dismiss.) The defendants fail to explain, however, why the inventory states that they also seized and removed a "cam corder" and "pictures." (*Id.*).

The defendants in their individual capacities would indeed enjoy qualified immunity shielding them from damages for acts undertaken while performing a discretionary function that do "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *International Islamic Community of Masjid Baytulkhaliq, Inc. v. United States*, 981 F. Supp. 352, 370-71 (D.V.I. 1997), *aff'd*, 176 F.3d 472 (3d Cir. 1999) (unpublished table decision). This immunity, however, does not protect the defendants from acts that, if true, would amount to theft.

Accordingly, the defendants' claims that the Government of the Virgin Islands has not waived its immunity from tort liability in this instance similarly fails. The plaintiff has offered ample evidence at this stage supporting her claim that

the individual defendants were negligent or committed wrongful acts while acting within the course of their employment. If proven, the individual defendants are liable to the plaintiff in both their individual and official capacities, and the Government of the Virgin Islands is liable for the acts of its employees, having waived its sovereign immunity from such claims. See 33 V.I.C. § 3408.³

Reviewed in the light most favorable to the plaintiff, the facts as alleged by Fleming, and as supported by the defendants' inventory of property, raise a question of material fact that cannot be resolved by the Court. Accordingly, the defendants' motion to dismiss or, alternatively, for summary judgment on Count II, and on Count I as against the individual defendants in their individual capacities, is denied. The plaintiff shall file an amended complaint conforming her allegations to this memorandum. An appropriate order is attached.

ENTERED this 3rd day of October, 2000.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:

³ The plaintiff is not entitled to have her claim against the government arising under the Virgin Islands Tort Claims Act, heard by a jury. See 33 V.I.C. § 3413.

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ORINN ARNOLD
Clerk of the Court

By: _____
Deputy Clerk

NOT FOR PUBLICATION

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Defendants.)
)
_____)

ORDER

For the reasons set forth in the accompanying memorandum of even date, it is hereby

ORDERED that the defendants' motion to dismiss and/or for summary judgment (docket #47) is **GRANTED IN PART** and **DENIED IN PART**. Further, it is hereby

ORDERED that Count I of the plaintiff's complaint is **DISMISSED WITH PREJUDICE** as against the Government of the Virgin Islands, the Virgin Islands Police Department, and the remaining individual defendants in their official capacities. It is further

ORDERED that the plaintiff shall file an amended complaint, conforming her allegations to the accompanying memorandum.

ENTERED this 3rd day of October, 2000.

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FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
ORINN ARNOLD
Clerk of the Court

By: _____
Deputy Clerk

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